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| In the Matter of | : | Date Issued:(Ref. April 2, 2001 |
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| DENNIS TURCOTTE | : | Case No. 2000-LHC-2133 |
| Claimant | : | |
| | : | OWCP No.1-140282 |
| | : | |
| V. | : | |
| | : | |
| BATH IRON WORKS CORPORATION | : | |
| Employer | : | |
| | : | |
| and | : | |
| | : | |
| SELF-INSURED | : | |
| Carrier | : | |
| | : | |
| and | : | |
| | : | |
| DIRECTOR, OFFICE OF WORKERS' | : | |
| COMPENSATION PROGRAMS | : | |
| Party in Interest | : | |
| | : | |

DECISION AND ORDER

This matter arises pursuant to a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act filed by Dennis Turcotte of Auburn, Maine. Claimant alleges that he sustained cumulative trauma injuries to his neck and shoulders working overhead as an electrician. He reported his injuries to his employer, Bath Iron Works, on February 6, 1997, and July 5, 1998. As a result, he contended that in recent years, although his hourly wage rate has increased, his annual earnings have decreased because his injuries have required him to take a job that requires less reaching above the head and offers fewer overtime hours than his previous job. Turcotte thus claimed that, in addition to a number of days of alleged permanent total and temporary total disability, Tr. 19-22, he suffered a permanent partial disability and loss of wage earning capacity due to the decrease in work hours. Tr.21-22.

Following the hearing, Claimant withdrew his claim for overtime,

acknowledging that he “did not lose overtime because of his injury,” but he continues to pursue compensation for days off due to flare-ups of his symptoms. Bath Iron Works contends that there is no medical evidence supporting an injury related reason for Claimant’s absence from work on days he claims temporary total or permanent total disability. In addition, the parties dispute the appropriate average weekly wage for purposes of this proceeding; Employer contending that it is \$702.00, while Turcotte alleges that it should be \$823.00.¹

The record shows that Turcotte has worked as an electrician in the electrical shop at Bath Iron Works consistently since June 12, 1979. Tr. 34-35, 52. His duties included shipboard construction, running cable, installing equipment in hulls under construction on the ways, an area where ships are built on an incline out of the water prior to launch, Tr. 106-07, and on the water following the launch of the ship. Tr.35-36. In 1991, as a work leader investigating and solving problems often in overhead situations, Tr. 37-38, 53, 88-89, he noticed symptoms of neck pain and minor tingling in his fingers, arms, Tr. 38, and later his shoulder. Tr. 41. By late 1996, these symptoms intensified and, Claimant contends, effected his ability to work. Tr.40. He believes working overhead caused his neck problems and is unsure what caused his shoulder and wrist problems. Tr. 42.

The record shows that Dr. Mazorra, Chief of Occupational Medicine at Bath Iron Works, examined Turcotte and restricted his pulling, pushing, and overhead work on February 6, 1997, Tr. 44, predominantly due to right shoulder complaints. Tr. 54; CX 13. Upon her referral, Dr. Rioux, a neurologist, reported to Dr. Mazorra on May 8, 1997, that Turcotte had mild to moderate degenerative disk disease in the cervical spine and bilateral carpal tunnel syndrome, Cx 8. Dr. Mazorra obtained a follow-up neurologic consultation from Dr. Wilson who, on

¹ At the hearing, the employer objected to the admission into evidence of Claimant’s 1995 and 1996 W-2 wage and tax statements, marked as Claimant’s Exhibit 7-A, on the ground that they were not timely and fairly noticed. Tr. 5-7. Claimant’s counsel, in response, represented that she believed she noticed this exhibit as early as her request for informal conference, Tr. 7,11, and requested leave to review her files to determine, “if they were in fact served.” Tr. 11. Accordingly, I deferred ruling on Exhibit 7-A, Tr. 11, and afforded counsel an opportunity post-hearing to document whatever prior notice Claimant afforded the employer. Tr. 12-13, 23-24.

Claimant’s post-hearing comments filed March 19, 2001, did not mention Exhibit 7-A or otherwise document service upon or prior notice to opposing counsel. The employer’s objection to Claimant’s Exhibit 7-A is, therefore, sustained.

June 16, 1997, recommended conservative treatment. EX 18. Dr. Mazorra closely monitored Turcotte's treatment and progress, CX 13, and allowed him to self-police his activities on board ship until December 15, 1997. Tr. 45.

Despite these restrictions, Claimant testified that he was able, with difficulty, to perform his shipboard work, Tr. 45, including overhead tasks and overtime jobs without any increase in his symptoms, Tr. 46, 55, 61, Tr. 79, 90. He claims, however, the work required him to take many individual days off due to neck and shoulder problems. Tr. 47,49. Some of these days, Claimant reported as code 06, or personal business days, some as code 09, or work-related injury, and some he changed to code 02, or no report. Tr. 50; CX6; EX 8. He contends that until November 18, 1997, he did not claim workers' compensation days because; "I was not aware that this was work-related injury until 11/18/97." Tr. 49-50, 69-70, 89.

Claimant continued to work at his regular job, shipboard, until December 15, 1997, when he reported a knee injury and was assigned to an alternate work program sorting nuts and bolts. Tr. 42. On January 7, 1998, Turcotte was examined by Dr. Booth, an Orthopedic Surgeon. Dr. Booth diagnosed cervical spondylosis, shoulder pain, mild lateral epicondylitis, left, and bilateral carpal tunnel syndrome. He reported that Turcotte could; "continue working with the current restrictions. These would include limited overhead use, especially in positions where he has to hyperextend and rotate his neck." CX9; EX 12.

Because the sorting exacerbated his neck problem, Turcotte was transferred to the recycling area of the electrical shop, (*See*, Booth report dated March 2, 1998. CX 9.), and subsequently he was assigned to the local wire way group, or stud team, where he works at present. Among his stud team duties, Turcotte prepares "as-built" drawings recording how the mechanics actually construct the ship around the wiring. Tr. 43, 64-65, 104-05.

On June 19, 1998, Dr. Esponnette, a specialist in Physical and Rehabilitation medicine, evaluated Claimant's neck and shoulder pain which he related to overhead work, knee symptoms caused by kneeling, and carpal tunnel syndrome. He recommended medication and continued limitations on Claimant's physical activities. *See also*, Esponnette report date July 14, 1998, EX 13. A behavioral medicine evaluation dated December 3, 1998, concluded that Turcotte needed social and pain management counseling and recommended a three-month treatment program to address behavioral factors. EX 17, CX 10. While he pursued the biofeedback program, Turcotte continued to treat with Dr. Herzog who

administered osteopathic manipulation. *See*, Herzog reports dated December 9, 1998, March 18, 1999, and April 1, 1999. EX 14

Claimant acknowledges that his knee injury, which has resolved, Tr. 42, not his neck, caused him to leave his shipboard work, Tr. 44, 54-55, but he contends his neck and shoulder restrictions prevented him from returning to the work he did before his knee injury. Tr. 80. He did not ask for his shipboard job back and it was not offered to him. Tr. 91-93.

Prior to his knee injury, Claimant contends he lost regular time, but acknowledges he did not have a doctor's excuse to miss work. Tr. 57, 70-72. He apparently kept a daily journal of the reasons for his absences on various days, but the journal was not offered into evidence. Records in evidence show that in 1997, Claimant was absent a total of 59 days, 6.2 hours, 1 day of which he designated a "yard injury." In 1998, Claimant was absent 56 days, 1.4 hours, designated as vacation/comp time or personal business, and 26 days for "yard injury." In 1999, he was absent 32 days, 3 hours, for vacation/ comp time, personal business, or "no report," 1 day due to weather, 9 days when there was "no work," 1 day off, and 53 days he reported as "yard injury." In 2000, he was absent 36 days for vacation/comp time, or personal business, 2 days when there was no work, 1/2 hours late, and 61 days he reported as "yard injury."

The record shows that Dr. Mazzorra confirmed work injury absences on July 11 and 14, 1997. By addendum to her February 2, 1998 report, Dr. Mazorra also reported that Turcotte was using vacation time for work related injury rather than code 09. *See also*, Mazorra report dated May 5, 1998. On May 15, 1998, Dr. Mazorra confirmed Turcotte's injury related absences on February 17, 18, 19, 20, 23, 24, 25, 26, 27, 1998, and March 2, 3, 4, 5, and 6, 1998. *See*, Tr. 76. Dr. Raczynski treated Claimant's multiple symptoms from at least July 10, 1998, to February 2, 2000. CX 11; EX 16; Tr. 76-77. He confirmed Turcotte's absence from work for medical reasons related to his pain symptoms including side effects of his medications, on July 20, 27, 29, and 30, August 3, 17-21, and 24, 1998. He was unsure about the reason for the absence on July 13, 1998. CX 11. Subsequently, the employer compensated him for some of his days off but not others. Cx 6, Code 15; Tr. 51. Dr. Herzog confirmed in his April 1, 1998 report that Turcotte presented with symptoms of his injuries on March 17 and 18, 1999, but he opined that Claimant did have the capacity to perform light duty on those days although he had taken himself out of work. Claimant highlighted on Claimant's

exhibit 6, certain other days and hours when he alleges he was out of work due to his injuries, but agreed that he has been compensated for some of those days but not others, and may have provided doctor's notes for some of these absences but not others. Tr. 46-51, 69-70.²

Discussion

Claimant contended at the hearing that his average weekly wage was adversely affected by the gradual onset of his work-related physical symptoms. As a result, counsel argued that Claimant's wages in the year prior to his injury, 1996, do not accurately reflect his pre-injury wage earning capacity as manifest in his much higher 1995 earnings. Lost overtime and absences in 1996 due to the gradual onset of injuries require, in Claimant's view, application of Section 10 (c) of the Act "to come up with a wage that reflects his earning capacity without the effects of the injury." Tr. 6.³ Although Claimant failed to submit a brief discussing the novel issues raised at hearing, Tr. 24-25, the evidence does not otherwise support a Section 10 (c) analysis which includes 1995 earnings. While the case law indicates that the trier of fact may, under section 10(c), take into account factors which lessen an employee's earnings in the year prior to the injury, (*See, Hayes v. P&M Crane Co.*, 23 BRBS 389 (1990); *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462 (1981)), it must be clear that the lost work would be available in the future. *Lozupone* at 464; *Pruner v. Ferma Corp.*, 11 BRBS 201 (1979). As noted above, Claimant has acknowledged that he did not lose overtime as a consequence of his injury.

In addition, Claimant contended at the hearing that he highlighted on Claimant's Exhibit 6 the days he was off due to his injury, and although he was not, in 1997, aware that he had a work-related injury, Tr. 50, he testified;

² Claimant's counsel had not, as of the hearing date, counted the days and hours of alleged temporary total and permanent total disability she was claiming or identified which form of disability she believed might apply to which day or hour. Tr. 20-22. She believed the facts she alleged could be gleaned from the record, but represented that she would address these issues in her post-hearing brief. Tr. 21.

³ Counsel acknowledged that she was making a complicated argument, and noted, "I don't find anything in then case law that tells you the appropriate way to handle this kind of problem, a cumulative trauma injury that gradually reduces earning capacity." Tr. 6. Counsel, however, indicated that she had researched the issue and would brief the argument post-hearing. Tr.24; Tr. 131.

Q. Now, when you missed these individual days due to pain, did you check with a doctor or report the situation to any doctor?

A. I either called the doctor or wrote him a letter. Tr. 51.

Claimant subsequently testified, on cross examination, that he may not have talked to a doctor each time he took off, and only provided doctor's notes when requested. Tr. 70. Thus, Claimant's testimony is inconsistent with respect to extent to which he communicated with his physicians, but the reasonable impression conveyed by his testimony is that while he may not have contacted a physician on every occasion he took off, he did consult a physician on most occasions.

It is thus significant that the physicians he consulted have reviewed their records and confirmed certain days off due to injury. None, it appears were confirmed in 1996. While Claimant, in 1996, may not have appreciated the work-related nature of his injury, and thus not reported under code 09 as Dr. Mazzorra suggested in her February 2, 1997, addendum, that would not explain the absence of medical documentation that he was consulting his physicians about pain symptoms allegedly keeping him out of work. His testimony indicates he was checking with his doctors about his pain, but the medical evidence does not confirm medical reasons for his absences in 1996. There is, then, a lack of credible evidence in this record which supports Claimant's contention that the progressive onset of his symptoms adversely affected his average weekly wage in the year before his injury. Accordingly, it would appear appropriate, on this record, to conclude that Claimant's earnings in the year prior to his injury accurately reflects his average weekly wage of \$702.00.

In addition, I find and conclude that Claimant's that the medical records documenting Claimant's absences from work due to injury constitute the most reliable record of the days he suffered employment-related disabilities. Thus, Claimant highlighted on Claimant's Exhibit 6 many more days of injury time off than the doctor's confirm. Yet, Claimant's testimony indicates that his physicians should, for the most part, be able to corroborate his absences.

While Turcotte may have been absent due to injury on an occasional day undocumented by the medical reports in evidence, his testimony that he consulted

with a doctor when he took off leaves as speculation any attempt on this record to ascertain the few days he may have been off due to injury which a physician cannot confirm. With respect to those unconfirmed days, I find that Claimant's testimony and highlighted designations on Claimant's Exhibit 6 fail credibly to establish injury-related time off and fail to sustain his burden of proof. Accordingly, Claimant will be awarded temporary total disability compensation for each day a physician confirmed his time off for injury related symptoms.⁴ To the extent Claimant has already received compensation for any of these days, the Employer shall be accorded appropriate credit. Therefore;

ORDER

IT IS ORDERED that the employer pay to Dennis Turcotte compensation for temporary total disability for the following days: July 11, 14, 1997, February 17, 18, 19, 20, 23, 24, 25, 26, 27, 1998, and March 2, 3, 4, 5, 6, 1998, July 20, 27, 29, and 30, August 3, 17-21, and 24, 1998, March 17 and 18, 1999, based upon an average weekly wage of \$702.00, and shall receive credit for compensation already paid.

STUART A. LEVIN
Administrative Law Judge

⁴ At the hearing, Counsel indicated that some of Claimant's time off represents permanent total disability and that this issue would be addressed in a brief filed post-hearing. Claimant's post-hearing comments, however, failed to address this issue.

